

SILVERMAN  THEOLOGOU

# REOPENING UPDATE

A Credit Union's Guide to the COVID-19  
Pandemic and Beyond

*Best Practices Webinar*

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# Reopening to the New Normal

**As governments begin to lift Stay-At-Home orders and Credit Unions begin to reopen, in accordance with State and County sanctioned Phased Reopening, what will reopening look like, what changes will we need to make in how we live, work and interact with our co-workers and Credit Union members?**

## **Taking the “Country’s Temperature”:**

- Polls taken at the beginning of the COVID-19 outbreak indicated that most Americans expected to use stimulus checks to pay for rent and food during these uncertain times, however updated polls now indicate that Americans are spending those checks to pay down debt, purchase consumer products and electronics, savings and only 25% of Americans are using the stimulus checks for necessities such as rent and food
- An updated poll taken in May of 2020 indicates that although unemployment was expected to rise to over 25%, unemployment currently stands at between 14% and 17%. Supposing those workers return to their positions upon reopening, that number would decrease to 7% (still double the rate of unemployment in February 2020)
- As governments and Credit Unions struggle to find the right way to reopen and keep both employees and members safe, 80% of Americans polled favor unemployment and stimulus checks through 2020 so they may choose whether to stay home or return to work

**Today we will look at what to expect from Reopening and what you can do to make that transition smoother. We will discuss:**

- **Court Phased Reopening and Legislative action**
- **CFPB and other State and Local regulatory action**
- **Best practices from an employee benefits and insurance prospective, including benefits pre-funding**
- **Human Resources best practices for avoiding issues that could lead to employee lawsuits**



# Legal Considerations – Reopening the Courts

## MD:

- **Phased reopening**
- **Phase I** – March 16<sup>th</sup> to June 5<sup>th</sup>
- **Phase II** – June 6<sup>th</sup> to July 19<sup>th</sup>
  - Clerk's offices re-opening, but not to the public
  - Remote Hearings
  - Some counties proceeding with no witness hearings
- **Phase III** – July 20<sup>th</sup> to August 30<sup>th</sup>
  - Clerk's offices open to the public
  - Remote hearings
- **Phase IV** – August 31<sup>st</sup> to October 4<sup>th</sup>
  - Civil non-jury trials
- **Phase V** – October 5<sup>th</sup> forward
  - Full reopening - all proceedings

## DC:

- Courts are currently open
- No civil collection proceedings are moving forward due to DC Emergency Declaration
- Creditors will be able to initiate new collection lawsuits and litigate collection cases starting August 10<sup>th</sup>
- Trials for cases on the collection calendars in the Civil Division and in Small Claims have been cancelled and will most likely be set for late August to early September (at the earliest)



# Legal Considerations – Reopening the Courts

## VA:

- Decentralized re-opening strategy | Re-opening decisions made at local level
- Many smaller jurisdictions began reopening May 18<sup>th</sup> | As of today, all courts have opened to some extent
- Hearings are being spread out over the next few months
- Courts limiting the number of cases that can be heard in a day

## CA:

- Decentralized re-opening strategy | Re-opening decisions made at local level
- All California courts are gradually re-opening and have implemented guidelines to address challenges related to facilities, personnel, jury management, case management and processing, and communications.

## WA:

- Civil jury trials suspended until July 6<sup>th</sup>
- Non-emergency civil matters may be continued until after June 1<sup>st</sup>
- Priority given to all emergency civil matters that can be heard by telephone, video, or other remote means

**Rules and standards vary by Court but they generally concern social distancing, face coverings, screening courthouse visitors, and remote hearings (EXPECT TO SEE ZOOM HEARINGS IN PLACE OF IN PERSON HEARINGS)**

- A more comprehensive list of State and Local action can be found at:

<https://docs.google.com/spreadsheets/d/1fGU1H2HPd4miayKBil-NeXnta4sB95gUoxPjjAThERY/edit#gid=1273627032>



# Legal Considerations – Actions Permitted Timetable

- **Bankruptcy:**

- MD: Proceeding now, but so long as State of Emergency is in effect, debtors provided approximately 90 additional days to respond
- DC: All in court proceedings will be held telephonically or if scheduled before 7/15/2020 be continued at the Judge's discretion
- VA: Proceeding as usual with the exception of telephonic hearings instead of personal appearances
- PA: Proceeding as usual
- NC: Proceeding as usual
- CA: Proceeding as usual with the exception of telephonic hearings instead of personal appearances until 6/30/2020
- WA: Closed to the public until 7/31/2020 – All hearings will be held telephonically
- FL: Closed to the public until 6/30/2020 – All hearings will be held telephonically.

- **Foreclosure:**

- MD: Foreclosures suspended until 7/27/2020
- DC: Judicial foreclosures suspended until 60 days after the State of Emergency is lifted
- VA: Proceeding now
- PA: Foreclosures suspended until 7/10/2020
- NC: Proceeding now
- CA: Judicial foreclosures suspended until 90 days after the State of Emergency is lifted
- WA: Proceeding now – No evictions until 8/1/2020
- FL: Most jurisdictions have suspended judicial foreclosures until State of Emergency is lifted



# Legal Considerations – Actions Permitted Timetable

- **Repossessions:**

MD: No repossessions until the State of Emergency and Catastrophic Health Emergency is lifted

DC: No repossessions until 60 days after the DC Emergency Declaration expires (8/10/20)

VA: No prohibition

PA: No prohibition

NC: No prohibition

CA: No prohibition

WA: No prohibition

FL: No prohibition

- **Garnishments:**

MD: Garnishment accepted but can't attach CARES Act funds

DC: No garnishments until 60 days after the DC Emergency Declaration expires (8/10/20)

VA: Certain jurisdictions not processing Wage or Bank Garnishments

PA: Garnishments are being accepted but larger jurisdictions may not process them until 7/6/2020

NC: Garnishments are being accepted but larger jurisdictions may not process them until 7/6/2020

CA: Garnishments accepted but can't attach CARES Act funds

WA: Wage/Bank garnishments on consumer debt have been suspended until State of Emergency is lifted

FL: Garnishment accepted



# Legal Considerations – Federal Legislation - Stimulus 3.0

## UPDATE – Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act

- House lawmakers recently approved a Democratic proposal to provide \$3 trillion in coronavirus relief, titled the HEROES Act (“Health and Economic Recovery Omnibus Emergency Solutions Act”), that would include a new wave of funding for state and local governments, workers and families
- Some of this 1800 page legislation’s highlights include:
  - extending emergency family and medical leave until the end of 2021.
  - adding another round of direct cash payments to Americans (including an expansion of the IRS payment program where Americans will receive up to \$6,000.00 in stimulus payments)
  - extending federal unemployment benefits to the end of January (\$600.00 per week in addition to State unemployment benefits)
  - adding hazard pay for front-line workers and also expanding virus-testing efforts, contact tracing and treatment
  - directing nearly \$1 trillion to state, local and tribal governments, including \$500 billion in direct, flexible aid for state governments and an additional \$357 billion for local governments and counties
  - adding \$200 billion in pandemic hazard pay for essential workers; \$75 billion for coronavirus testing, contact tracing and treatment efforts
- ***THE LEGISLATION ENACTS SWEEPING CHANGES TO THE FDCPA: CREDITORS ARE DEEMED DEBT COLLECTORS; NO DEBT COLLECTION PERMITTED UNTIL 120 DAYS POST “NATIONAL EMERGENCY”; FDCPA STATUTORY VIOLATIONS INCREASED 10X (\$1,000. TO \$10,000.)***
- Before they will consider the legislation, Senate Republicans are insisting that any new legislation include liability protection for businesses and individuals to protect against lawsuits once they reopen or repopulate; a move Democrats oppose
- Finally, the President has signaled that the House legislation, in its current form, would be vetoed
- As both parties have indicated a need for a Stimulus 3.0 package to be passed and implemented, we will continue to follow this and update you as the need arises



# Legal Considerations – Observations and Best Practices on Reopening

## **Credit Unions need to think about Reopening based on State Guideline, Collection Optics and the Needs of Members and Staff:**

### **Credit Union Member Considerations:**

- Americans are using stimulus fund checks to pay down debt and purchase consumer and household items; less than 25% of Americans are using stimulus for rent and food
- 80% of those polled would like to see stimulus checks through 2020; using that money as they used the initial checks
- US unemployment estimates are far less than predicted in March of 2020, and with Reopening expected to drop again significantly (although still double the unemployment number of February 2020)
- Recent Phased Reopening appears to be driven more by individual needs to no longer stay-at-home, as opposed to medical professional recommendations
- How can Credit Unions best accommodate members who wish to pay down debt, visit branches and meet with Credit Union management and staff

### **Credit Union Collection Considerations:**

- Need to prepare for the accumulated wave and dealing with your bad debt portfolio – how will you refer accounts (do you need a referral plan after months of not referring accounts) – will you need to stagger letters to avoid “batch” collection letters
- Need to balance collections and managing bad debt with the optics of filing lawsuits, setting court hearings and taking judgments post pandemic reopening – once Courts begin processing filings, do you plan to file 200 lawsuits in a day, or will you have a managed plan in place for filing new actions?
- Need to think about POST PANDEMIC collections and customer care to deal with rising bad debt and the potential exponential rise in bankruptcy filings once collection, repossession and foreclosure actions resume - will you need new policies and more flexibility to deal with the “new economy” – will you need additional staffing (collections vs. customer service reps) to handle new needs of your members and staff – how will you staff (in house vs. remote staffing)

**Helpful links to State Phased-In Reopening and How to Best Reopen your Credit Union for Employees and Members:**

Please see below a link to what the 50 States are doing regarding Phased in Reopening

<https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html>

Please see the link to the US Chamber of Commerce with guides and helpful hints on reopening

<https://www.uschamber.com/co/start/strategy/how-to-prepare-offices-for-reopening>

<https://www.uschamber.com/co/start/strategy/safely-reopening-businesses-tips>



# § CFPB and Upcoming Regulatory Action – CFPB Status

- It's ten year anniversary is in July – *Is anyone celebrating?*
- The Supreme Court is due to decide *Seila Law v. CFPB*
- In its Supreme Court Brief, The Bureau conceded that its single director structure, which allows the removal of its director only “for cause”, violates Article II of The Constitution
- Possible outcome – Be careful what you ask for
- The president has the authority to remove the director at will, and if there is a new administration, the new president may appoint a new director



## CFPB and Upcoming Regulatory Action – The CFPB of the Future

- FDCPA rulemaking was promised in May, 2020
- Any rulemaking could be undone by Congress as it happened when The Consumer Arbitration Rules were gutted
- If the CFPB is in your future, it could mean enhanced regulatory enforcement for creditors and collectors



## CFPB and Upcoming Regulatory Action – Emerging from COVID-19 (The Day of Reckoning is Coming)

- Expect scrutiny where credit dispute investigations were delayed
- Expect aggressive enforcement where payment accommodations are not reflected in credit reporting
- Extensions of new credit post-pandemic
- Removal of ban on utility service cut-off
- Expiration of bans on collection activities and post judgment enforcement
- The first payment is now due on 3-6 month “No Payment” car loans
- Many workers in hard hit industries will not return to work



# CFPB and Upcoming Regulatory Action – Interaction with State Governments and Attorney’s General

- New State proposals to extend restrictions on post-judgment garnishments
- Some collection restrictions will remain post-emergency
- Expect enhanced regulatory scrutiny of:
  - repossessions
  - collection methods
  - collection litigation
  - discriminatory conduct In credit granting and collections
- State Attorney Generals likely to lead the way on credit reporting issues
- Original creditors are subject to debt collection laws in several states, e.g. Maryland, Florida, Pennsylvania
- Most state laws require “ascertainable loss” to bring suit



# Employee Benefits and Insurance Considerations for Reopening- Workers Compensation and General Liability Insurance

If an employee or visitor to your Credit Union becomes infected with the COVID-19 virus, this could have implications on your Credit Union's insurance policies, including both your workers' compensation and general liability insurance policies

## **Workers' Compensation Claims:**

- Workers' compensation statutes provide that an Employee is entitled to benefits for **occupational diseases** but typically exclude **ordinary diseases of life** to which the general public is equally exposed
- If an Employee can establish **direct causal connection to the workplace**, workers' compensation coverage may apply
- If the employee is alleging that they contracted the virus from work, report the claim immediately to your workers' compensation carrier (any claims of work-related exposure should be reported immediately to your workers' compensation carrier even before the employee tests positive for the virus)

## **General Liability Claims by Non-Employees:**

- In many cases, general insurance policies contain a liability provision similar to the provision below: "...We will pay damages which an insured party becomes legally obligated to pay for bodily injury or property damage arising from an occurrence to which this policy applies, and is covered ... and if the insured party is sued for these damages, we will provide a defense at our expense..." "We do not cover any ... intentional or criminal acts or omissions of an insured party"
- Therefore coverage decisions as to claims by third parties may hinge on having written policies and procedures in place geared toward preventing the spread of COVID-19 to employees, members and visitors.
- Ensuring these policies and procedures are followed will also be important, so document your firm's policies, and create daily, weekly, and monthly checklists for employees to ensure policies are being followed
- A full review of insurance policies for applicable provisions may provide guidance as to coverage



# Employee Benefits and Insurance Considerations for Reopening - OSHA & Personal Protective Equipment (PPE)

## OSHA and Personal Protective Equipment

### When a hazard exists:

- Employers can mandate that employees use PPE *and*
- Employees have the right to demand PPE
- *Examples:* Face masks, gloves, goggles, face shields, respiratory protection

### What rules govern PPE? Employer must:

- Perform a hazard assessment
- Consider other alternative options to protect employees
- Identify and provide appropriate PPE
- Train employees in use, care, cleaning, and replacement of PPE
- Prepare a plan that is periodically reviewed



# Employee Benefits and Insurance Considerations for Reopening - Maintaining and Reinforcing Social Distancing

## **Helpful Hints to Safely Reopening:**

- Limit member and staff occupancy
- Create one-way aisles to avoid contact
- Install plexiglass dividers to avoid passing of virus
- Create a floor plan including placement of tables or other physical barriers to create distance
- Create contactless delivery options for members and staff
- Place floor tape to mark 6-foot distances
- Limitations on elevator usage and use of “public” areas



# Employee Benefits and Insurance Considerations for Reopening → Bridging the Gap with Benefits Pre-Funding

## **Using benefits pre-funding to bridge the gap between declining returns and rising employee benefits costs**

- How do Credit Unions take advantage of these changes in the market and hedge against declining interest income and the increasing cost of employee benefits ... Benefits Pre-Funding
- In 2003, the National Credit Union Administration amended Regulation 701.19, giving federally chartered credit unions the ability to place assets earmarked for future employee benefits costs into investment funds that are normally impermissible, or otherwise non-traditional Investments
  - A non-traditional investment is an investment that strays from the Traditional Bond investment, which can have a higher yield to be used to pay for and enhance your employee benefits
- What constitutes a "Benefit" under this program
  - The term benefit when it comes to Pre-Funding is very broad. It can include:
    - Employee group healthcare
    - 401(k) matching contributions
    - Long-term and short-term disabilities
    - Dental and vision insurance
    - Benefit pension plan investments





# Employee Benefits and Insurance Considerations for Reopening— Market Conditions and Benefits Prefunding

## Current market conditions and benefits pre-funding

- NCUA has given Credit unions a means to make smart investments that produce a higher yield and pay for their benefits. Right now with the market volatility it is a good time enter the market using non-traditional investments.
- Benefits pre-funding can improve Credit Union Financials and increase ROA. Typically goals are to **out-perform permissible yields by 200% - 300%** net of fees.
- Benefits pre-funding could create a situation where your employee benefits expense is budget neutral
- Benefits pre-funding allows Credit Unions to offer a more robust benefits package despite rising employee benefits costs



# Human Resources – Emergency Paid Sick Leave and Expanded Family and Medical Leave Act

- Employers under the new Relief Acts are to provide up to 2 weeks of paid sick leave at the regular payrate to employees who need to take leave from work for certain specified reasons related to COVID-19, including:
  - Employee or someone the employee is caring for is subject to a government quarantine order or has been advised by a health care provider to self-quarantine
  - The employee is experiencing COVID-19 symptoms and seeking medical attention
  - The employee is caring for a son and/or daughter whose school/place of care is closed or whose childcare provider is unavailable to reasons related to COVID-19
- Act also provides up to an additional 10 weeks of paid expanded family and medical leave where an employee is unable to work due to the need for leave to care for a child whose school or childcare provider is closed or unavailable due to COVID-19
- In addressing these kinds of ongoing situations, close communications with the employee is key
- Employer focus will gradually shift to re-opening as the summer progresses



## Human Resources – Practical Considerations

- Should consider pursuing funds which may be available under the new Paycheck Protection Program (PPP). Round two of PPP is underway, and will be depleted soon
- Congress recently relaxed the PPP guidelines, providing employers greater flexibility as to payment, time, and allocation
- Company need not deplete operating capital in light of the new temporary furlough provisions, which provide more money for a longer period of time
- Employer has unique discretion to check employees' health for maintenance of safe work environment, including temperature checks if necessary and appropriate
- If PPP funds are used for core purposes such as payroll and rent, the loan becomes a grant and does not need to be repaid
- New Congressional provisions do not supplant the employer's continued authority to remove employees for reasons of inadequate performance
- The company should adopt a resolution articulating and demonstrating the PPP need



# Human Resources – The Virginia Values Act and Changes to Maryland Law

- The Virginia Values Act amends the Virginia Human Rights Act (“VHRA”) to create a cause of action for unlawful discrimination in public accommodations, employment, housing practices, and credit on the basis of sexual orientation and gender identity, as well as other recognized factors
- Allows the causes of action to be pursued privately by the aggrieved individual or, in certain circumstances, by the Attorney General
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- Allows the causes of action to be pursued privately by the aggrieved individual or, in certain circumstances, by the Attorney General
- The Virginia Values Act has removed the caps placed under the VHRA and courts may award prevailing employees “compensatory and punitive damages” and uncapped “reasonable attorney fees and costs.” The court may also issue injunctive relief
- Before civil action can be taken, the aggrieved individual must file a complaint with the Division of Human Rights of the Department of Law, participate in an administrative process, and retrieve a notice of their right to commence a civil action
- Virginia is also enacting new HR rights related to pregnancy discrimination and accommodation with immediate right to sue
- Maryland changes: new obligations exist regarding the Mini-WARN Act, and prohibition on wage history inquiries
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# Human Resources – Best Practices for Returning to the Workplace

- Have a written return-to-work policy in place that outlines the phases for having employees return to work safely. This should determine when and how to return employees to onsite work.
- Have a written Teleworking policy. Employer will need to consider which employees can or should continue to work remotely.
- Setup a pre-opening coordination/meeting with your supervisory personnel to ensure aligned messaging.
- Designate an individual or HR Team Lead to oversee all Covid-19 related issues within the workplace, including compliance with return to work policy, guidelines, re-opening the worksite, employee training, addressing employee concerns, etc.
- Review contracts and insurance policies to assure coverage for Covid-19 treatment and testing, and any exceptions
- Prepare the workplace by following the OSHA and CDC as a baseline to implement cleaning and disinfection protocols, changes to the physical workplace, the use of masks and gloves, and whether or not to screen employees
- Provide reasonable accommodations to employees who may be more vulnerable to COVID-19 due to underlying health conditions or ask to continue to telework due to childcare, health and/or safety concerns
- Confirm a safety plan that helps employees feel safe but members feeling welcomed to enter, with distancing and other safety protocols



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